

CLOSINGS AND THE CLOSING PROCESS

**Manual on Acquisition Practice and Procedure, Negotiated Acquisitions Committee,
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As we begin a discussion of closings and the closing process, we are reminded by an admonition from a senior partner to one of her junior associates as they entered the closing room: "Closings would be great if it weren't for the people." The closing itself involves a curious mixture of science and art - science in the careful drafting and execution of documents that definitively set forth the terms of the acquisition transaction, and art in the constant interplay of personalities that determine whether or not these magnificently-drafted documents will ever be executed. As with every other area of the practice of law, preparation for this important event is critical, and where one is unsure of how detailed or comprehensive to be in addressing details, more is better (and safer) than less.

There are many legal issues and business issues in any deal, failure of which to resolve can result in failure. There are closing conditions beyond the control of either party which can kill the deal. Most prominent among these are consents or actions needed from third parties over whom neither purchaser nor seller has any control. There are bankers lurking in the shadows who may or may not provide badly-needed funds for the deal to go forward. And as if all of this is not enough, there is time, that constantly nagging element which in and of itself (missed deadlines, flagging interest, lost business opportunities, changing markets) can result in the parties giving up and moving elsewhere.

A. Planning the Closing Process.

Get ready for some fun.

Preparation has been occurring since the first meeting of the parties, for the occurrence of a complete and successful closing is the whole point of each and every event in the acquisition process. As we have addressed developing relationships, determining valuations, negotiating of the deal and due diligence in prior chapters, all this has the sole purpose of making closing possible. Our momentary focus should be on planning of the closing itself--those (hopefully) few hours in a conference room or two in which documents are signed and the parties reach the point where the "deal is finally done".

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1. Preparation for Closing -- The Client.

Before we get started with meetings with opposing counsel and his client, our first focus should be on our client and his needs in the closing process. This warrants an extended phone call or maybe a visit after a review of the contract itself to look for any unusual issues that make extra time in the process or that might be particular stumbling blocks. Particular attention should be focused on points in the transaction that are not settled yet. The essence of closing is a completion of each and every necessary point of the deal, and every unresolved point should be viewed as a potential impediment. These remaining issues will eventually be incorporated into one or more of the closing documents, which documents should be highlighted for particular scrutiny as the process continues. This early meeting should also include a discussion of the procedural aspects of closing (when and where it is best to close).

Identifying the remaining issues should result in some sort of sorting process. Some issues will be factual issues on which the client will have clear positions. Other issues will be more legal in nature (wording of instruments of conveyance, provisions of ancillary documents). Counsel should be prepared to deal with both. While remaining issues are a problem for each transaction, surprise remaining issues are far worse and far more likely to get a transaction off track.

2. Preparation for Closing -- The Other Side

Are we enemies or friends?

Any young lawyer will quickly tell you that the other side is the enemy and that our objective in closing and in every other aspect of the transaction is to get the better of the other side through brute force and intimidation. Under this theory, every phone call or conference should be an opportunity to force our will on the other side. If you, as counsel, have managed during the course of events leading up to the closing to develop an antagonistic relationship with the other side, that relationship will color all that goes on at closing. It will make every document more difficult to draft and every issue more difficult to resolve. If such a relationship exists, it might be worth the effort to patch it up in time for closing, or at minimum, to explain the difficulties to your client so that there will be no surprises when hostilities emerge in the closing room.

Are we neither enemies nor friends?

With the proliferation of e-mail communications, it is entirely possible to approach closing with no relationship at all with opposing counsel. E-mail is a great advancement in that it lets us communicate more quickly and with greater ease than has ever been possible before. The down side is that communication by computer fails to develop relationships between counsel that could make the difference in getting a deal closed. If to this point you find that you barely recognize the voice of the person you will be closing with, you've been making excessive use of impersonal communication devices, such as e-mail, facsimile and FedEx (ICD's). The few weeks leading up to closing would be a good time to get over your ICD addiction. Pick up the phone and call opposing counsel rather than using your computer. Hearing the sound of each

other's voices develops a sense of expectation on the part of each of you that can make communicating in person easier when the actual closing occurs.

Do we all really want this deal to go forward?

If one side or the other does not want the deal to go forward, particularly if it is your client, your strategy will be radically different from that set forth in this chapter. Your focus should be not only on the client's interest in walking from the transaction but in advising your client as to the potential legal liability from failing to live up to his or her commitments. Careful attention should be paid to case law dealing with the obligation to deal with the other side in good faith.

B. The Closing Agenda.

Where's my list?

Well in advance of closing, "someone" should have prepared a comprehensive closing agenda for the deal. If you find yourself asking who that someone might be, then it probably is you. Once prepared in draft form by either seller's or purchaser's counsel (purchaser's counsel more often takes this role), the agenda will have a life of its own and will be added to or commented upon by all the parties to the transaction. It will be a central link between all the parties involved and the elements that must be brought together for closing to occur.

A critical feature of the agenda is a listing of the person or persons responsible for the preparation of the various documents or the taking of various actions. The closing agenda serves multiple purposes: (1) it is a means of communicating to the various parties who is responsible for what and measuring progress towards closing; (2) it is a constant status report on whether the closing is ready to occur; and (3) it is an essential tool for the attorney in the execution and post-closing process.

Many items on the list will be there for routine purposes, an example being the acquisition agreement itself. If the Agreement was signed without schedules, the missing documents should be highlighted on the agenda. A sample agenda with closing notes is included in the Appendix as Document _____. The goal in preparing in the agenda is to create a universal listing of documents that must be prepared and signed at closing and a listing of actions that must be taken to complete the transaction.

The best closing agendas include as much information as possible about where the deal stands. Not only are documents and the responsible party listed, but also a running commentary of where the process stands with each item (such as "drafted and sent to seller's counsel for review"). The agenda is also a place to visit when a deal veers off track and questions must be asked about who is slowing things down. For some of the parties, the agenda may need to be prepared in multiple parts. For example, the purchaser might not warm to the idea of disclosing to the seller that the financing commitment letter has not even been signed or that a new appraisal is needed before funding is secured.

Either in the Agenda or in a separate document, a closing timetable should be set out. A sample closing timetable is included in the Appendix as Document _____. The timetable

establishes expectations from all parties, counsel and other advisors as to the pace at which the closing is to occur.

C. When should it close? The Closing Date and the Timetable.

Are you ready?

When asked, "When should this deal close?", the answer from most clients will be "As soon as possible". As this date is set, the practitioner should bear in mind that many clients have no feel for the magnitude of work that must be done to complete closing but are anxious to have the transaction closed quickly no matter what. The answer to the question depends more on what has to be done prior to closing than on the desires of the parties, and each client should be fully informed that trying to rush a closing "before its time" is stressful, overly expensive, and can result in a breakdown in relations between the parties that results in the closing never happening at all. Closing time also depends on the extent to which there are third parties involved whose conduct cannot be controlled or the extent to which closing conditions beyond the seller and purchaser will determine when the transaction can be closed. Once a realistic closing date is set, the remainder of the closing timetable can be filled in. This will require input from all the parties to the deal, but the drafter must use his or her best efforts to be realistic. An unrealistic closing timetable can create the same sort of stress and friction as an unrealistic closing date.

D. Place and Time of Closing.

My place or yours?

The place of closing may be governed by the acquisition agreement, in which event the reader can skip to the next section. The physical characteristics of the closing place may have a role in its success or speed. Parties who are in comfortable surroundings may be more inclined to take the time to consider various issues and to respond favorably to points of compromise than would parties in an un-air-conditioned warehouse or at the local Motel 6. More important than physical comfort is the ability to communicate. The place of closing should have adequate photocopying, facsimile, computer, and telephone access and a staff to operate them.

As to the geographical location, many factors may play a role. Convenience of the parties is typically foremost, but the location of the business being acquired, the need to be near third parties, such as suppliers, recording offices, or capital markets, or other factors, may also be important. Finally, the negotiating strength and availability of persons associated with the seller or the purchaser may be a factor. As you advise your client in selection of location, two contradicting schools of thought are worth considering. The first is that your client may be more comfortable and at ease in familiar surroundings. The second is that the other side may be more comfortable in familiar surroundings. Most attorneys would jump to the conclusion that your client's favored location should be the objective, but it is equally valid to point out that if you are trying to obtain last minute concessions from the other side, you are better off with a relaxed person on the other side of the table and you may well be willing to travel to increase the comfort level of your opponent.

Can I come to your party?

In view of most traditionalists, those persons who attend should be those whose signatures are necessary and those who are needed to furnish information necessary to close. In this latter group would be company accountants, outside CPA's, and possibly other advisors. People whose presence should be considered are counsel, both principal counsel and local counsel, accountants, both internal and outside, bankers and their counsel, underwriters and their counsel, and generally those central characters whose role is vital to the closing. If there is a person whose signature is needed, the conservative approach is to require his or her presence.

Against the conventional wisdom, we would point out that the fewer people in attendance at closing, the more likely it is to progress smoothly. Unless a person's role is vital, his or her very presence adds an additional dynamic to the discussions. Every person in attendance will naturally seek a role for himself or herself, be it interjecting comments on various topics or complicating the stream of advice going to one side or the other. None of this is helpful to the closing objective. So, the ultimate role of the attorney in influencing who should attend is to take the role of Goldilocks and select the size and mix that is neither too hot nor too cold but "just right". As with many other aspects of the closing process, there is nothing scientific about this decision. It is all art.

Is this deal ready?

This question refers directly to the closing agenda and the myriad list of closing conditions that are found there. Counsel should be particularly sensitive to obtaining the consents of third parties who will not be at closing and who may not be so quick to sign papers that are essential to the transaction going forward. Original documents are another issue. Although courts accept photocopies and facsimiles for most purposes, counsel should pay special attention to originals, such as minute books and stock certificates, that are required at closing. Certificates of good standing, certified copies of patents, business licenses, insurance certificates, and other originals should be in folders and ready for delivery well in advance of closing. Counsel should also be mindful of the need to form new entities in connection with the transaction. It may be relatively fast to form a new Delaware subsidiary, but qualifying it for business in another state may take weeks, and the transaction may well require certificates of good standing in both jurisdictions.

In timing the closing, the practitioner should also attend to non-execution issues, such as the need to move funds to the seller at closing. Wiring and payment instructions will be needed both for the seller and for any other third parties involved in the transaction, as well as for the myriad of service-providers that may be involved (environmental engineers, lenders, underwriters, appraisers, etc.) Wiring deadlines should also be noted. In some cases a delay of two days between pre-closing and funding can be a good idea when a third-party lender is involved and conditions to the loan transaction must be met.

Other last-minute "bring down" issues should also be considered in advance of closing. The client must attend to any last minute inspections, inventory services must count parts, U.C.C. searches need to be brought current, payoff letters must be obtained, and third-party

estoppels must be executed by tenants, landlord, franchisors, licensors, and any number of persons with whom the target company deals.

E. The Pre-Closing.

The cure for the chaotic closing.

In all but the simplest of closings, it is wise to have a pre-closing session one or two days in advance of the funding date. In fact, many practitioners have ceased calling this a pre-closing in order to avoid the sense that it is not important and refer to the pre-closing as the closing and the day on which the deal is actually deemed closed as the funding date. In either event, it is important to have a session, beginning ideally with lawyers only, in which all documents are placed in folders and finalized and made ready for signature by the principals. Documents should be prepared with an awareness not only of the words of agreement but also with sensitivity to the fact that document schedules can be equally important and because of the needed input from others (accountants, business people, etc.), schedules can take longer to finalize. By the time of pre-closing, all legal opinions should be finalized, and depending on the comfort level of counsel, legal opinions should be signed and placed in folders in escrow pending the funding of the transaction.

Can we spend all week doing this?

Depending on the availability of the parties, it might be advisable to schedule a series of days in which the parties can execute documents. The process is simple enough. The attorney coordinating the closing sets aside a conference room in which to domicile the documents and the various parties arrive at their convenience to execute them. This procedure provides the maximum flexibility and convenience and avoids the opportunity, always present where a formal closing is held, for the parties to engage in discussions which raise new issues. A variation on this formula is a "FedEx" closing, in which the documents are never isolated in a single location but are sent by courier to the various signatories and returned when fully-executed. It is fair to say, however, that the closing process itself is tiring, and causing the execution of documents to drag over a long period of time can create its own sort of stress for the parties.

In any event, whether accomplishing the execution of documents through a formal closing or through FedEx or some combination of the two, it is important for the closing attorney to carefully manage expectations of the parties. While it is impossible to predict with any degree of certainty how long a particular closing will take, more than one closing has gotten out of hand when a client's patience has worn thin. It is important to create realistic expectations of what time and effort it will take a client to get through the deal, and those expectations should include some idea of unforeseen events that may complicate things. A patient and understanding client will make the lawyer's job easier and will do a better job for himself than one who expected a six hour closing to take ten minutes.

Do we really have to close?

Virtually every acquisition agreement has an expiration date of some sort. Such a date provides a measure of finality to the transaction and a date beyond which the parties need not continue to try to close the transaction. Once the date has arrived, failure of the parties to close

might give either side (assuming no breach of the agreement) the option to walk from the transaction. It is not unusual for one party or the other (usually the party with greater bargaining superiority) to permit a contract to lapse, with the effect that the parties approach the closing without a binding obligation to proceed to close. The condition often gives one party or the other an enormous advantage as it comes to finalizing of documents. A document drafted in accordance with the acquisition agreement is no longer subject to the charge that it does not properly reflect that agreement, but also to the charge that even if it does, the reviewing party is not so sure he wants to proceed in that manner. The parties who have traveled the farthest distance or who have made the greatest number of assumptions regarding closing or who are most dependent on the transaction going forward are at a negotiating disadvantage that is difficult to overcome. The best practice is for any party to refuse to come to the closing table without a valid and binding acquisition agreement in hand. The drafting and signing of an extension is an easy enough task. Failure to do so can change the complexion of the closing entirely and lead either to a huge shift in the terms of the transaction or its unraveling altogether.

But there are still issues out there!

From this discussion naturally follows: We know the pre-closing is a nice idea, that documents should be finalized in advance and the signing process should be a snap, but this is the real world. What do we do when things aren't quite so nice?

There are events that can be planned and those that cannot. Certainly if going into a closing you are aware of ten separate issues that remain unresolved, each of which could potentially blow the deal, you ought to plan for those. Planning might include encouraging discussions and resolution of the issues in advance, or even delaying closing until the issues are resolved. If this fails, you are doomed to a closing that is both a negotiating session and a closing. Obviously the negotiations must come first, and while negotiating skills are beyond the scope of this volume, it goes without saying that if your objective is to get the deal closed, the issues should be resolved at first. They should be resolved in a room with the decision-makers present (and as few other people as possible), and they should be resolved all at one time, rather than on an issue by issue basis. Once the issues are resolved, corresponding changes to the documents can be made and the deal can proceed.

Also bear in mind that the pace of some deals requires that a closing date be set when it really isn't ready. Depending on the personalities of the seller and buyer and the dynamics of the transaction, setting a closing and proceeding through a messy two-day process of finalizing documents, attaching schedules, conducting inventories, finalizing balance sheets, etc., is the only way a particular deal may ever be concluded. If that is the case, the lawyer must be as committed to closing as everyone else and willing to devote whatever effort is necessary to having documents finalized and the deal concluded within the timetable expected by the clients. It is axiomatic to say that there speed and quality of legal work conflict, quality must prevail, and no lawyer should be forced to proceed at a pace which runs the risk of overlooked issues, improperly drafted documents, etc., but sometimes the only way to finish an acquisition is to force its conclusion, and the practitioner must use all his skills to insure both quality and speed in bringing about the closing.

F. The Closing Itself.

A Lawyer's Utopia.

In the ideal world, there really should be very little to a closing. The closing numbers should have been worked out in advance, inventories taken, closing balance sheets completed, and other aspects of the deal buttoned down in advance. Also because the parties have been diligent in circulating copies of the closing documents, the documents should be ready to execute without further discussion. A well-organized closing agenda will encourage this result by showing both the status of various items as well as the person responsible. Even when closing items are not quite ready at the time of closing, a carefully-planned and successful pre-closing can promote the same result.

Is that all there is?

A closing should not be a three day boondoggle by lawyers and accountants to a foreign city in which persons of great importance spread documents around massive conference tables and display their sartorial skills to the delight of their clients. One of the major problems with closings is that people are gathering with other people in a single place with the expectation that something important is happening. While expectations differ from client to client, all the participants expect some important occurrence. All (except the practitioner who buys off on the comments in this chapter) will be disappointed if nothing more happens than a short and well-organized signing session. The ideal closing thus presents to the practitioner an objective that is totally at variance with the expectations of virtually everyone involved and which may actually be disappointing to many of the participants. "Is that all there is?" can be uttered at the closing in a sense of disappointment, but if in fact that "is that all there is", the lawyers may have done a magnificent job for their respective clients. The objective is to close, and the faster and simpler the closing is, the more likely the transaction is to actually close. We should manage our clients' expectations accordingly and have them share our sense of pride when the closing is so quick and smooth that it hardly seemed worth the time to gather.

G. The Closing Statement.

Does the closing statement matter?

While this manual will not go step-by-step through the various documents that are needed in a typical closing, the Closing Statement deserves special attention. In stock transactions, there may be only an abbreviated closing statement or possibly none at all. The document has greater significance in an asset transaction where numbers relating to the purchase price may be generated at closing. Where the Closing Statement does have significance, it may be a challenge for a number of reasons. First, it may include information that is obtained from sources largely beyond the lawyer's area of expertise, so there is the need to coordinate the gathering of that information and a need to specially focus on reducing that information to writing and having it summarized in closing statement form. Secondly, it may often hide unresolved issues that must be dealt with at closing.

If this is important, why wait until the end?

The finalization of the closing statement is like any other aspect of the closing process. The practitioner must identify the parties whose input is needed, communicate that responsibility to them, and then follow-up to be sure the information is obtained in a timely manner. Particular attention should be paid to third-parties whose information is needed. It is not unusual for lawyers to finalize and sign the closing documents and then focus on the closing statement. Following this procedure can eventually result in a closing but it won't happen quickly. A better strategy is to circulate a blank closing statement to all parties well in advance of closing and to assign each blank to a single person. Accountants might produce working capital numbers, operations people might furnish inventories, staff will show deposits and prepaids, bankers will furnish payoff numbers, etc.

Does the closing statement matter?

Is it binding?

One legal question lurks in all this. What is the legal effect of the closing statement? It is most typical for a closing statement to recite that it is a mere summary of funds disbursed at closing. Under that structure, the acquisition agreement itself continues to represent the binding obligation of the parties, even as to funds owed at closing, so that should there be an inventory error or a failure to properly compute working capital, the aggrieved party could return to the other for a recomputation of the purchase price. More rarely, the closing statement represents the final decision of the parties as to the purchaser price and takes priority over any conflicting provisions of the acquisition agreement or the other acquisition documents. This later procedure is not necessarily improper, but it clearly puts greater weight on the document. The most important thing is for the practitioner to be aware of which it is, and to avoid, through the execution and delivery of that document, an unintended modification of the purchase price. Closing counsel should also remain constantly aware of the status of various closing conditions, some of which could also be waived by the mere act of closing. Both seller and buyer should remember to provide specifically in the closing statement for retention on a post-closing basis of any conditions which have not been waived or satisfied and which should be satisfied during the post-closing period.

What goes in?

Finally, we will make a passing reference to the question of what appropriately should be included in a closing statement. There is a tendency among some lawyers to include in the closing statement every last-minute agreement that has been reached by the parties. A commitment to furnish further documents could be included as well as the duty to cooperate in a newly-discovered law suit or to assist in transitioning a critical customer or employee. Others contend that this practice unnecessarily "junks up" the closing statement and that it should focus primarily on the numbers needed to close the deal. Where last-minute items are not included in the closing statement, they might easily be included in a separate post-closing agreement, which agreement could be used in connection with a post-closing escrow, if one is appropriate.

H. Mechanics of Closing.

Did I sign that?

Although this topic has been hotly debated in recent years, it is now universally recognized that a facsimile signature acts to bind the signatory and can be enforced for most purposes in all courts of law. The better practice is to begin the closing process in time for all signatures to be originals, but where facsimile signatures are necessary to get a deal closed, they are acceptable. The custom is to accept facsimile signatures with the understanding that originals will be circulated post-closing and used in the final closing binders. E-mail or electronic signatures have not yet been recognized widely and until that occurs, should not be relied on in the context of closing.

All we need is signatures.

One of the most frustrating aspects of some closings is the unfettered use of "signature pages" during the closing process. The scenario goes something like this: The attorney drafts all the documents and has the signature pages signed by his client. He then enters the closing process with the apparent authority on the part of the client to make wholesale substitutions of pages that are necessary to reflect various further understandings of the parties. These modified pages are then attached to the original signature pages to form a complete document that is to be final and binding on the parties. Two years later the document is being litigated in court and the client is asked on the witness stand to authenticate the document. His response is unnerving but truthful: "I just signed the signature pages and my lawyer made some changes that weren't authorized." Is the document binding? The better practice is to have the document signed when they are completed and no sooner.

Paperclips?

Now we address some of the trivia of closing procedures. After two or three years of law practice, every lawyer knows that staples are your enemy. As soon as a document is stapled, it will inevitably need substitute pages. By the end of a complex closing, the more central documents can have upper left-hand corners resembling a piece of Swiss cheese. The prudent approach is to keep all documents in clips until they are finally distributed.

Trust me.

In most closings, there is a single attorney in charge of the closing facilities. Typically the purchaser's counsel will furnish closing space and handle the details of the physical facilities. That attorney is bound by the canons of ethics and subject to disciplinary action should he act improperly with respect to the documents, such as for example, by arriving in the dead of night to substitute a few critical pages. This framework is enough for most counsel to trust their counterparts with custody of documents overnight and during the various stages of the closing process.

The more difficult question relates to the custody of documents at the end of the closing process. A frequently practice is for the final act of closing to be the division of the documents into two neat stacks, one of which is retained by purchaser's counsel and one by the seller's

counsel. This brings some finality to the transaction and puts each counsel in a position to prepare binders for his or her respective clients. Another approach, not altogether infrequent, is for all documents to be left in the custody of one of the attorneys, who then undertakes to prepare closing binders and distribute the originals and copies to the various parties. The pitfalls of this procedure are obvious. Clients frequently need immediate access to some of the documents (the closing statement and assignments of contracts are frequent candidates). Clients also look unfavorably on an overly trusting attitude towards opposing counsel and feel more comfortable with closing documents in their own control. The better practice is to leave closing with your own set of documents.

Is that really your signature?

Counsel should be mindful of the need to address particular jurisdictional requirements. Instruments of conveyance, such as deeds and mortgages, will need to be notarized and in some cases will need separate witnesses. The laws in all fifty states now permit a single officer to bind a corporate entity where such is authorized by resolution, but an attestation by a secretary or other officer, at least on the instruments of conveyance themselves, provides a further measure of the legitimacy of the signatures. In the interests of practicality, it is unusual for there to be initialing of every page to avoid alterations. The existence of duplicate sets of documents, together with possible criminal penalties for improper conduct, addresses concerns over subsequent modifications.

I. Legal Opinions

Why do we need these legal opinions, anyway?

One other specific area of closing also deserves attention--the legal opinion. This is the one aspect of the closing for which the client likely has no appreciation, and even the most loyal of clients can lose patience with trusted counsel when he learns that he is paying for counsel to negotiate his way through five pages of redundant and meaningless qualifications. While the scope and content of legal opinions are the subject of other writers, our main concern in this manual is to encourage counsel to get the legal opinions on the table early and to make every conceivable effort to avoid waiting until closing for resolution of opinion language. Given the multi-state nature of many transactions and the propensity of counsel to handle transactions throughout the country, the need for local counsel should be considered early. Attorneys should also be mindful of the proliferating institution of the opinions committee--a nameless, faceless group of attorneys cloistered somewhere in the corridors of opposing counsel's offices, which group apparently has little regard for your need for opinions. The main issue with opinions committees is the delay they can inflict on a closing. The attorney would be wise to inquire at an early point about the need for peer review and approval of opinions and to quantify any delays likely to arise from the opinion process. Also, counsel would be mindful of the need of opposing counsel to see original signatures on closing documents before the opinion is released.

J. Funding.

Was I supposed to bring the money?

Once documents are completed and the closing statement has been finalized, it would seem an easy task to pay the purchase price. However, given the time delays that can be encountered in the wiring process, counsel would do well to make special inquiry about the funding process. Wiring instructions should be solicited from recipients in advance and the seller's bank alerted to the need to move promptly once instructions to fund are received. Counsel can encourage bankers to identify early on the person who will have physical possession of the wire transfer instructions. Where possible, those instructions should be completed in advance so that once the decision to fund has been made, money can be moved swiftly.

Weekends are for more than golf.

A particular word of warning is in order for the Friday closing. In any transaction, it is usually critical for the purchaser to both receive the funds and have the opportunity to invest them on the date of funding. It is entirely possible, where a wire has been initiated late in the day, that the wire may be initiated (and thereby debited from the purchaser's account) on a given date but not received at all by the seller on that date or received too late in the day to be invested. The funds then sit uninvested until the next business day. If that next business day is Monday after a Friday, significant earnings can be lost over the failure to invest.

K. Other Happenings on the Closing Date

Is it my business now?

While the attorney is focusing on documents and funding, the client should be forewarned to focus on those other business activities associated with the closing that must take place on the closing date. Insurance coverage must be in place for the business, the parties must attend to the physical transfer of possession (keys, combinations, etc.), announcements to employees must be made and third-parties whose contracts have been transferred must be notified.

L. Deals Not Ready to Close.

This just isn't happening.

Notwithstanding Herculean efforts by all involved, there are inevitably deals which cannot close on the designated closing date no matter what. In some cases, failure to close will cause the contract to expire, furnishing an opportunity for one party or the other to hold out for better terms. In some cases, time constraints make the transaction no longer attractive to one party or the other, in which the parties part ways. What to do when a deal is not ready to close and closing occurs anyway depends largely on the reasons for the failure. Where the parties have not finished taking inventories or compiling closing balance sheets, a mere extension of the agreement may be appropriate. However, in some cases where the future conduct of one party or the other is in question, the parties may try to implement some sort of escrow arrangement in anticipation of closing. Escrow arrangements range from leaving the documents on a conference

table (hopefully secured) for a few days, to executing a formal escrow arrangement in which documents and funds are placed with a third party in hopes of closing.

Who do you trust, and for how long?

Where a formal escrow agreement is used, the usual drafting considerations apply. The parties must choose an escrow agent and carefully outline in the document the condition or conditions that must be met in order for the documents to be released and funding to occur. Such a document should, like the acquisition agreement itself, contain a "drop dead date", at which time documents will be destroyed and funds returned if the transaction has not closed. The simplest approach for the triggering event is to require joint instructions from the parties on the date of funding. Another approach would be to permit the escrow agent to accept a verified statement from one party or the other as to the occurrence of an event or the satisfaction of a closing condition.

Yet another agreement to draft.

Another approach to the transaction not quite ready to close is the entering into of an agreement as to post-closing matters, sometimes including an escrow. Where conditions remain to be fulfilled by the seller, the buyer could easily place a portion of the purchase price in escrow pending satisfaction of those conditions. Where there is some seller-financing of the transaction, an offset agreement as to the promissory note can accomplish the same objective. Where it is known (or expected) that a transaction might be moving towards closing when it in fact is not ready, the practitioner would be well-advised to visit with the client on this topic. If the issues are well-known, it might be appropriate to even draft a post-closing agreement or escrow agreement in advance so that it can be used for that purpose without delay.

M. Non-Legal Aspects of Closings: *While you're at it*

In addition to all the legal technicalities of closing, the most important of which is getting the documentation right, the practitioner must attend to the numerous issues involved every time human beings undertake activity together. Those include promoting courtesy among clients and counsel (even when it is not deserved), serving drinks and food, providing ample telephones, etc. While luxurious accommodations are not necessary to a closing, comfortable surroundings do lessen stress and promote an attitude conducive to resolving issues. Bursts of emotion are permitted if part of some sort of perverse negotiating strategy, but otherwise emotions should be checked at the door, particularly for counsel, but hopefully for the other participants as well. One finer point of these discussions is the need for food. Among accomplished professionals, one of the most denied facts is hunger. Given the opportunity to work through lunch, every lawyer worth his salt will forge forward. About two hours after mealtime, attitudes deteriorate and the crowd becomes irritable for no apparent reason, except for the fact that no one has eaten. If your objective is to keep everyone on an even keel and in good spirits and moving smoothly towards the conclusion of the transaction, you must keep everyone eating. You must do this even if it appears a sign of weakness on your part. Hungry participants are irritable participants and irritability can cause deterioration of a closing in a hurry.

Issue two in the personal comforts category is the need to sleep. Your malpractice carrier would appreciate your getting adequate sleep each night, even when a deal is pressing. If you accept the thesis that lack of food causes irritability and threatens the progress of a closing, you must admit that lack of sleep is much worse. If your goal is to appear as the most macho lawyer in the room, you might well opt for an all night closing session. If your goal is to really get your deal closed, you should take a break, go home and get some sleep (and a shower) and return bright and early to attack the problems at hand.

N. Common Pitfalls.

In concluding our discussion of the closing, we can easily reiterate what makes closings successful. Foremost among these is adequate preparation. It matters far more what you do in advance of a closing than what you do once the parties are assembled. Being attorneys, we naturally focus on the negative, so please permit us to present you with a listing of the top twenty reasons why closings fail:

1. Extraneous factors entirely outside the control of counsel (this, of course, is our favorite).
2. Too little time allocated for closing (a cheap and easy way to create unnecessary stress).
3. Inadequate preparation (almost always deadly).
4. Inattention to detail (equally deadly, not only to your client but to your career).
5. Failure to control third-parties (before you can control them you must identify them).
6. Failure of counsel to finalize documents in advance (blame-shifting on this is not permitted).
7. Unrealistic client expectations (some are unrealistic no matter what, but you can help adjust attitudes).
8. Murky acquisition agreement (call your malpractice carrier).
9. Incomplete Closing Agenda (You didn't tell me you needed that. . . .).
10. Inexperienced counsel on one side or both (or worse yet, inexperienced counsel who doesn't realize he or she is inexperienced) (we have all been on both sides of this one).
11. Overly aggressive counsel (you get paid for being nice).
12. Overly aggressive counsel who also happens to be inexperienced (maybe you don't get paid enough for this, but hang in there).

13. Missing persons (if you're too important to attend, maybe the deal is too insignificant to proceed).
14. Missing documents (lawyers, not paralegals, are responsible for eliminating chaos).
15. Missing funds (the Federal Reserve is not supposed to lose stuff.).
16. Unprepared bankers (we will release the funds when we receive these 36 documents . . .).
17. Surprises (any kind).
18. Hunger (you must admit that you are a human being, despite media reports to the contrary, and accordingly need food).
19. Temperature extremes (only the unprepared should be sweating).
20. National emergencies (these may actually be outside of your control).

While you may note that many of these issues are well beyond the control of closing counsel, a good lawyer with a passion for getting a deal closed does his or her best to overcome them all. The first reflexive impulse, that of saying it is beyond my control (a grown-up version of "Mommy, I didn't do it!"), should give way to an attitude of "we can get this transaction closed no matter what". The attitude itself will not bring about closing, but just the attitude, especially if it is contagious, could have more to do with a successful closing than you think.